

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MONTANA**

In re

**STEVEN ALEX DEINES, and
CATHERINE MARIE DEINES,**

Debtors.

Case No. **04-62682-13**

**STEVEN ALEX DEINES, and
CATHERINE MARIE DEINES,**

Plaintiffs.

-VS-

**INTERNAL REVENUE SERVICE, and
VICTORIA L. FRANCIS, ASSISTANT
U.S. ATTORNEY,**

Defendants.

Adv No. **04-00127**

O R D E R

At Butte in said District this 2nd day of March, 2005.

In the Adversary Proceeding, Plaintiffs/Debtors' Request for Jury Trial, docket #4, filed December 29, 2004, and Plaintiffs/Debtors' Notice of Conflict of Interest and Demand for 7th Amendment Common Law Jury Trial, docket # 12, filed January 21, 2005, are presently pending before this Court and are ready for decision. After Plaintiffs/Debtors' filed the initial request for jury trial, the Court issued an Order directing the Internal Revenue Service ("Defendant IRS") to file a response to Plaintiffs/Debtors' request for jury trial. The Defendant IRS filed its response

on January 5, 2005, wherein it declined to consent to a jury trial. For purposes of rendering a decision on these matters, the Court will issue two decisions. One decision will involve the Plaintiffs/Debtors' Notice of Conflict of Interest that the Court will deem a motion for disqualification. The other decision will involve the Plaintiffs/Debtors' Request and Demand for Jury Trial. This decision involves Plaintiffs/Debtors' Request and Demand for Jury Trial.

Plaintiffs/Debtors filed their chapter 13 bankruptcy case on August 30, 2004. On October 4, Defendant IRS filed proof of claim no. 3, alleging secured, unsecured and priority unsecured claims. On October 28, 2004, Plaintiffs/Debtors filed an objection to this claim, which was denied for its nonconformity to this Court's local rules. Plaintiffs/Debtors filed a second objection to Defendant IRS's proof of claim no. 3, on November 5, 2004. Defendant IRS file a response and request for hearing to the objection and set the contested matter for hearing on January 25, 2005. On November 15, 2004, this Court issued an Order directing the Plaintiffs/Debtors to file an adversary proceeding to consider all issues raised by their objection and holding and consolidating the objection to claim with the adversary proceeding. On February 11, 2005, Defendant IRS filed an amended proof of claim no. 8 alleging secured, unsecured and priority unsecured claims, which is contested by this adversary proceeding and the objection to claim filed by Plaintiffs/Debtors.

This adversary proceeding constitutes a core proceeding under 28 U.S.C. § 157(b)(2)(A), (B), and (O) dealing with matters concerning the administration of the estate, allowance or disallowance of claims against the estate, and other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor relationship and this Court has jurisdiction under 28 U.S.C. § 1334.

The Defendant IRS, through its amended proof of claim no. 8 filed on February 11, 2005, claims a secured claim for penalties and interest associated with income tax arising for calendar tax year 1998 in the amount of \$2,781.85, claims an unsecured priority claim for assessed tax and interest associated with income tax arising for calendar tax years 2001 through 2003 in the amount of \$54,159.31, and claims an unsecured claim for assessed tax and interest associated with income tax arising for calendar tax years 1998 through 2000 in the amount of \$35,317.80.

Plaintiffs/Debtors object, through their objection to claim, doc. # 21, to the original claim, no. 3, and the amended claim, no. 8, on the following grounds: (1) the proof of claim is void; (2) the Defendant IRS's record of recorded lien does not match the Notice of Federal Tax Lien recorded with the Yellowstone County Clerk and Recorder's Office; (3) the assessed tax claimed by the Defendant IRS is greatly exaggerated; and (4) Plaintiffs/Debtors have not received a procedurally proper assessment. Plaintiffs/Debtors' objection to claim filed on November 5, 2004, doc. # 24, states the following grounds: (1) the Defendant IRS's record of recorded lien does not match the Notice of Federal Tax Lien recorded with the Yellowstone County Clerk and Recorder's Office; (2) the Defendant IRS relied on "DUMMY" documents as supporting evidence a presumed tax liability; (3) the assessed tax claimed by the Defendant IRS is greatly exaggerated; and (4) Plaintiffs/Debtors were denied requests for a collection due process hearings.

Plaintiffs/Debtors' adversary proceeding complaint, filed in this case, alleges: (1) the proof of claim is void; (2) the Defendant IRS's record of recorded lien does not match the Notice of Federal Tax Lien recorded with the Yellowstone County Clerk and Recorder's Office; (3) the assessed tax claimed by the Defendant IRS is greatly exaggerated; and (4) Plaintiffs/Debtors have

not received a procedurally proper assessment; (5) the Defendant IRS claims Plaintiffs/Debtors did not file tax returns; (6) Plaintiffs/Debtors have been denied requests for a collection due process hearings or have not been advised of their rights to a collection due process hearing; (8) Defendant IRS sent notices of levy without supporting notices of seizure; (9) challenges to authority to Defendant IRS agents/officers. Plaintiffs/Debtors, through relief requested in their complaint, request that all collection activities stop and all liens and levies be lifted; that all Defendant IRS agents and officers prove delegated authority, that their objection to the Defendant IRS proof of claim be sustained; that any federal tax be turned over to the Plaintiffs/Debtors' estate for distribution to creditors, and that any agents/officers acting beyond their authority be removed. The Defendant IRS filed an answer and following a pretrial scheduling conference, the Court scheduled a trial, on May 16, 2005, in this adversary proceeding, on Plaintiffs/Debtors' motion for sanctions as it solely relates to collection activity arising during their chapter 7 bankruptcy case, and on Plaintiff/Debtors' objection to the claim, as amended, filed by the Defendant IRS.

Demand for Jury Trial.

A limited statutory right exists in bankruptcy courts to conduct a jury trial. "If the right to a jury trial applies in a proceeding that may be heard under [28 U.S.C. § 157], the bankruptcy judge may conduct the jury trial if specially designated to exercise such jurisdiction by the district court and with the express consent of all the parties." 28 U.S.C. § 157(e). Under Standing Order No. 12 (Revised), issued by the U.S. District Court for the District of Montana, on September 26, 1995, "[b]ankruptcy judge(s) of this district may conduct the jury trial with the express consent of all the parties." The Defendant IRS has not consented to a jury trial before

this Court in this proceeding, even though Plaintiffs/Debtors have requested a jury trial. “The district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.” 28 U.S.C. § 157(a). “Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to [appellate] review under [28 U.S.C. § 158].” 28 U.S.C. § 157(b)(1). “Core proceedings include, but are not limited to (A) matters concerning the administration of the estate; (B) allowance or disallowance of claims against the estate . . . ; and (O) . . . the adjustment of the debtor-creditor . . . relationship” 28 U.S.C. § 157(b)(2). The core proceedings referenced above as (A), (B), and (C) are matters alleged by Plaintiffs/Debtors and involve this Court determining the validity, basis and amount of the tax claim filed by the Defendant IRS. This Court further concludes the matters alleged in the complaint and objection to claim involve 11 U.S.C. § 505 that allows the bankruptcy court to “determine the amount or legality of any tax, any fine or penalty relating to a tax, . . . whether or not previously assessed, whether or not paid, and whether or not contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction.”

The court may not so determine –

(A) the amount or legality of a tax, fine, penalty, or addition to tax if such amount or legality was contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction before the commencement of the case under [title 11]; or

(B) any right of the estate to a tax refund, before the earlier of –

(i) 120 days after the trustee properly requests such refund from the

governmental unit from which such refund is claimed; or

(ii) a determination by such governmental unit of such request.

11 U.S.C. § 505(a)(2).

The issue becomes whether Plaintiffs/Debtors are entitled to a jury trial on the issues alleged in this proceeding. The U.S. Supreme Court, in *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42, 109 S.Ct. 2782, 2790 (1989) established a three-step analysis for determining whether a jury trial under the 7th Amendment is required in a bankruptcy action.

First, we compare the statutory action to the 18th-century action in the courts of England prior to the merger of the courts of law and equity. Second, we examine the remedy sought and determine whether it is legal or equitable in nature. (citations omitted). If, on balance, these two factors indicate that a party is entitled to a jury trial under the Seventh Amendment, we must decide whether Congress may assign and has assigned resolution of the relevant claim to a non-Article III adjudicative body that does not use a jury as factfinder.

Id.

The United States Bankruptcy Appellate Panel of the 9th Circuit, in *Smith v. United States (In re Smith)*, 205 B.R. 226, 229 (9th Cir. BAP 1997), concluded that plaintiff/debtor in a case contesting the amount and legality of tax “would not have been allowed to sue the sovereign in the courts of the 18th century common law England.” *Id.* In the instant case, Plaintiffs/Debtors, under similar facts, would not have been able to commence this action under common law in England in the 18th century to determine the amount or validity of a tax. Such a common law suit against the sovereign was not possible. In considering the second factor, whether the alleged matter is equitable or legal in nature, the *Smith* court concluded that a proceeding or contested matter to consider the allowance or disallowance of a claim invokes the equitable power of the bankruptcy court. *Id.* at 229 (citing *Langekamp v. Culp*, 498 U.S. 42, 44, 111 S.Ct 330, 331

(1990)). Under equity, Plaintiffs/Debtors are not entitled to a jury trial. *Id.*

Even if this Court concluded that the first factor, 18th century common law allowed a jury trial for such allegations, and that the second factor, such allegations are based in law, not in equity, were satisfied, which it does not, this Court would then need to determine if the allegations involve a public or private right. The U. S. Supreme Court in *Atlas Roofing Co. v. Occupational Safety and Health Review Comm’n*, 430 U.S. 442, 458, 97 S.Ct. 1261, 1270-71 (1977) concluded that “Congress has the right to deny trials by jury in actions at law where public rights are litigated.” “A public right has been defined by the Supreme Court in *Crowell v. Benson*, 285 U.S. 22, 52 S.Ct. 285 . . . (1932), as cases that ‘arise between the Government and person subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments.’ *Id.* at 50, 52 S.Ct. at 292.” *Smith*, 205 B.R. at 229 n.7. Given the definition by *Benson*, this proceeding involves a tax liability between Plaintiffs/Debtors and the United States and involves a public right, precluding a jury trial even if the above two factors were satisfied even though they are not.

Defendants/Debtors may also claim a right to a jury trial under 28 U.S.C. § 1346, which provides: “(a) The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of: (1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected” As provided under 28 U.S.C. § 2402, an aggrieved taxpayer may request a jury trial. “Any action against the United States under section 1346 shall be tried by the court without a jury, except that any action against the United States under section 1346(a)(1) shall, at the request of either party to such action, be tried by the court with a jury.” 28 U.S.C. § 2402. However, before

the right to a jury trial may be invoked in a case involving a tax assessment or collection or refund the taxpayer must pay the reputed amount owing. *Smith*, 205 B.R. at 230 (citing *Flora v. United States*, 357 U.S. 63, 75, 78 S.Ct. 1079, 1086 (1958), *aff'd on reh'g* 362 U.S. 145, 80 S.Ct. 630 (1960)). Based upon the proof of claim, as amended, filed by the Defendant IRS, and Plaintiffs/Debtors own allegations, the Court concludes that the full amount of tax has not been paid, so no right to a jury trial exists.

A more recent 9th Circuit case, *Dunsmore v. United States*, 358 F.3d 1107 (9th Cir. 2004), warrants consideration and discussion. In *Dunsmore*, a taxpayer sued the IRS for a refund in district court. The IRS argued that the taxpayer's bankruptcy estate owned the unscheduled refund claims. The district court, pursuant to stipulation, transferred the matter to the bankruptcy court for the trustee to administer or abandon the refunds claims. The trustee abandoned the claims and the bankruptcy court denied the taxpayer's request to transfer the case back to the district court on the determination that the refund claims action was a core proceeding. The circuit court concluded the refund claims action is non-core, entitling the taxpayer to have the matter heard by the district court with a jury trial, provided the taxpayer had standing. The circuit court concluded that the refund claims action was non-core because it did "not depend on the Bankruptcy Code for [its] existence and they could proceed in another court." *Dunsmore*, 358 F.3d at 1114.

Plaintiffs/Debtors' alleged claims against the Defendant IRS in the instant case involve the claims allowance process, and the hierarchical reordering of creditor's claims, which are vital in the bankruptcy process so confirmation of Plaintiffs/Debtors chapter 13 plan may proceed with distributions from property of the estate. Consequently, Plaintiffs/Debtors have submitted

themselves to the bankruptcy court's equity jurisdiction. The Court further concludes at this time that the bases for the alleged claims against the IRS involving objections to the IRS proof of claim, as amended, the collection activity by the IRS during the prior chapter 7 case and the determination of the amount or legality of the any tax, fine, penalty are core proceedings and are distinguishable from the refund claims discussed in *Dunsmore*. Plaintiffs/Debtors' alleged claims and objections against the Defendant IRS and its proof of claim, as amended, depend upon the Bankruptcy Code for their existence.

IT IS ORDERED that by a separate Order the Plaintiffs/Debtors' Request and Demand for Jury Trial is denied.

BY THE COURT

A handwritten signature in cursive script, reading "Ralph B. Kirscher", is written over a horizontal line.

HON. RALPH B. KIRSCHER
U.S. Bankruptcy Judge
United States Bankruptcy Court
District of Montana